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IN THE

SUPREME COURT OF THE UNITED STATES

No. 889

RUTH BRISTOW MALOY,

Petitioner,

vs.

JAMES H. BRISTOW, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RUTH BRISTOW MALOY,
Petitioner.
P. O. Box 334, Main P. O.,
Miami, Florida.

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RUTH BRISTOW MALOY,

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JAMES H. BRISTOW, ET AL.,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Ruth Bristow Maloy, in proper person, presents this her Petition for Writ of Certiorari to the Supreme Court of Florida, and shows:

I. Opinion of the District Court of Appeal of Florida, Third District. 138 So. 2d 801.

II. Grounds on which jurisdiction invoked. Petitioner as plaintiff is entitled to relief prayed. This equity cause having been noticed for hearing on the merits by respondents as defendants and failing to prove defense stated in Answer, was dismissed for failure of plaintiff to prosecute, with prejudice. Record discloses no such failure and plaintiff could not have refused to proceed and at the same time chose to do so, as stated in Order of Dismissal and Opinion.

Review is sought of Supreme Court Order denying certiorari, dated and entered June 29, 1962 in Min. B. 59, 184. Order denying Petition for rehearing dated Oct. 4, 1962. Order dated Dec. 20, 1962 extends the time to petition for certiorari to and including Mar. 2, 1963.

It is believed 28 U.S.C. 1257(3) confers jurisdiction to review order by writ of certiorari.

III. Questions presented for review.

1. Whether dismissal "with prejudice for failure of plaintiff to prosecute" was a denial of petitioner's right to trial by due process of law.

2. Whether holding of District Court that plaintiff failed "when she chose to represent herself" at final hearing, was a denial of petitioner's right to trial by due process of law.

3. Whether such dismissal and holding was a denial of the Constitutional guarantee that no State shall enact a law which deprives citizens of rights.

IV. The Statute involved is Sec. 1 to the XIV AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, providing:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S.C.A. Vol. Constitution Amendments 6 to 14.288.

VI. Statement of the case. Defendants set this equity cause down for final hearing on bill and answer—filed May 15, 1961, stating plaintiff's claim is barred by the Statute of Limitations, Laches and Equitable estoppel—by filing July 21, 1961 Notice of Hearing on July 28, 1961; 60 days allowed to take testimony expired. And renoticed

July 26, 1961 for final hearing August 29, 1961, as stated in the Order of Dismissal. (R. 1, 2, 3)

But the transcripts of the proceedings on said dates filed by defendants, do not disclose the findings that plaintiff "advised" August 29, 1961, and "answered" September 7, 1961, that she was not ready to "proceed to final hearing" and "The Final Hearing was continued . . . over the objection of counsel for the defendants." (R. 3) The Chancellor having denied plaintiff's request on objection of counsel:

> "Mr. Eakle: On behalf of the defendants, your Honor, I think we are entitled to a hearing on this matter and *a final determination of it.*
>
> The Court: All right. let's go ahead with the hearing. I will deny the Motion for continuance."

Granted plaintiff's Motion to amend and marked amendment filed instanter. Asked Counsel "What is the nature of the case?" who replied among other things at issue on bill and answer. And "What authority are you defending this case on?" counsel cited none; nor following discussion the Statute of Limitations applied when plaintiff asked "What is your authority on that? Granted "another hearing".

And September 7, ruled that "Notices for final hearing implies we take testimony" when plaintiff objected and having insisted hearing on bill and answer, answered "No" to the question "Did you obtain an attorney?" said:

> "The Court: Are you prepared to proceed with the case?
>
> Mrs. Maloy: No, sir. I am protesting. I am not having anything to do with it. There has been no motion for taking testimony.

The COURT: Is your answer that you are not prepared to proceed?

Mrs. MALOY: No sir. I am not.

The COURT: All right, draw an order dismissing the cause. (R. 8, 9, 10, 17, 18, 19)."

The District Court held dismissal eminently correct. Having found the cause noticed for "trial" July 28, 1961, and not "tried" but came on for "final hearing" August 29, 1961, and plaintiff's request for continuance granted. And September 7, when cause came on again for "trial" and "Final hearing", plaintiff "unwilling to proceed", and said that "plaintiff had been given the opportunity to obtain an attorney . . . when she chose to represent herself and proceed without counsel." (R. 20, 21)

VI. The questions sought to be reviewed were raised in the Assignments of Error by stating that "plaintiff was denied her Constitutional right to trial by due process of law, guaranteed by the Constitutions of the State of Florida and of the United States." And stating in the Petition filed in Florida Sup. Ct., that "said decision denied the plaintiff her Constitutional right, State and Federal to trial by due process of law and her day in Court." (R. 20, 6) (Petitions for rehearing not part of record, pursuant to rule, having been denied.)

VII. Reasons relied on for allowance of writ. The Supreme Court of Florida in failing to pass on the Federal questions, in effect decided in a way probably not in accord with applicable decisions of this Court. And so far sanctioned such a departure from the accepted and usual course of judicial proceedings by a lower court, as to call for this Court's power of supervision, pursuant to Rule 19.

RUTH BRISTOW MALOY,
Petitioner.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

JANUARY TERM, A.D. 1962

CASE NO. 61-737

RUTH BRISTOW MALOY, *Appellant,*

vs.

JAMES H. BRISTOW, ET AL., *Appellees.*

Opinion filed March 15, 1962.
An Appeal from the Circuit Court for Dade County.
Robert L. Floyd, Judge.
Ruth Bristow Maloy, in proper person.
Jack H. Eakle and Kenneth L. Ryskamp, for appellees.

Before PEARSON, C.J. and HORTON and CARROLL, JJ.

PER CURIAM.

The appellant, who was the plaintiff below, seeks reversal of the Order dismissing her suit for accounting, for want of prosecution. The cause was noticed for trial before the court on July 28, 1961. For a reason not disclosed on the record it was not tried then, but came on for final hearing before the court on August 29, 1961. On that occasion, at the request of the plaintiff, who had acted without counsel throughout, the chancellor granted a continuance to September 7. When the cause came on again for trial and final hearing on September 7 the plaintiff was unwilling to proceed and the chancellor entered an order dismissing her suit for want of prosecution. In so doing the chancellor was eminently correct. In State ex rel. Croker v. Chillingworth, 106 Fla. 323, 143 So. 346, 347, the Supreme Court said: "It is an inherent right of the court, and therefore one existing independently of the statute, to dismiss a suit for failure to prosecute it with due diligence." See also

Anderson v. Broward, 45 Fla. 160, 34 So. 897, Welgoss v. End, Fla. App. 1959, 112 So. 2d 390. Plaintiff had been given the opportunity to obtain an attorney to assist her, and when she chose to represent herself and proceed without counsel the chancellor was careful to inform her of the status of the matter, that the case was ready to be tried and unless progressed would have to be terminated.

AFFIRMED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1962

FRIDAY, JUNE 29, 1962

RUTH BRISTOW MALOY, *Petitioner*,

vs.

JAMES H. BRISTOW, ET AL., *Respondent*.

This cause having heretofore been submitted to the Court on Petition for Writ of certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District in said cause bearing date March 15, 1962 and the record having been inspected, it is ordered that said petition be and the same is hereby denied.

A True Copy

TEST:

GUYTE P. MCCORD,
Clerk Supreme Court,

(SEAL.)

(6190-3)